

MEMORANDUM OF TESTIMONY

HB 4314

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Following is a written version of the testimony I provide today regarding HB 4314. Because the text of HB 4314 is the same as the text of HB 5895 from the 2011-2012 legislative session, I will rely on the testimony I previously provided relative to HB 5895. I submit that testimony again below relative to HB 4314, albeit with some revisions to eliminate references to provisions in former HB 5879 that are not found in Substitute HB 4001 and to clarify the references to various subsections and paragraphs of HB 4314.

This testimony repeats the comment relative to HB 4001 that internal appeals should be mandated before a requester can file an action in circuit court and that those internal appeals may well resolve the majority of issues for requesters.

HB 4314

The Open Government Commission (Commission) created by HB 4314, as drafted, has a number of problems. We also have concerns that it is an expansion of State government with the creation of a new bureaucracy at taxpayer expense, and imposes new costs on public bodies for responding to appeals before the Commission. We note that Ann Arbor has an average of about five internal administrative appeals of FOIA responses each year – some of which do result in a modification of the original response. Ann Arbor has had only one FOIA response appealed to the circuit court in the last 16 years. We do not understand what issue it is that the proposed Commission is intended to resolve or address that isn't already addressed in the available processes for internal appeal and judicial review. We concur with the suggestion of other speakers that the internal, administrative appeal should be made mandatory before a requester can file an appeal with the circuit court.

Problematic provisions are:

- The Commission is weighted toward the broadcast and print media with 4 of the 9 members. Notably absent are any representatives of local governments – counties, municipalities and school districts – which are the entities that have to respond to FOIA requests on a daily basis.
- How will the Commission and its staff be paid for?
- What safeguards does it provide that the existing internal appeals and appeals to circuit court don't provide?
- The provision that an opinion of the Commission will be binding is inconsistent with the provision that a dissatisfied "citizen" can still, apparently, appeal to the circuit court.
- Is a "citizen" a requester? Or is the use of the term "citizen" intended to broaden who might appeal a response to someone else's FOIA request? Also, will proof of citizenship be required? Citizenship is not a prerequisite for filing a FOIA request.

- Even worse, a public body may not be able to appeal an opinion from the Commission because, as drafted, it appears to refer the appealing party back to Section 10 of FOIA, which governs appeals to circuit court. As currently structured, a government agency would never appeal its own decision. Therefore, Section 10 does not include a provision for the government entity to go to court.
- If Subsection (12)(D) of the new Section 10A created by HB 4314 is intended to create a right of appeal for a public body, that needs to be clearly stated. Otherwise, this appears to be just a reference to the existing right of appeal under Section 10 of the FOIA, which does not give a public body any right of appeal.
- Absent a change, a public body may be subject to an adverse decision, with no right of appeal – or even a cross appeal if the requester also was dissatisfied with the Commission’s decision and went to court. Although an argument can be made for due process reasons that the public body will have the right to judicial review of the Commission’s decision in the Court of Appeals, that is not clear.
- The Commission would be making legal decisions normally reserved to the courts in FOIA cases. Aside from the lack of judicial review, nothing in HB 4314 requires the Commission member to be lawyers or to have any legal training.
- Subsection (9) of the new Section 10A created by HB 4314 permits the Commission to meet in closed session to deliberate on the merits of an asserted exemption, exclusion or privilege from disclosure for a “writing.” The term “writing” needs to be replaced with “public record.” Not all “writings” are subject to disclosure under the FOIA; only those constituting a “public record.”
- Of greater concern, the Commission’s investigative process may jeopardize the privileges and exemptions asserted by a public body.
 - How will the attorney-client privilege be maintained if protected documents are provided to the Commission for review? In a court proceeding, those records are reviewed by the court in camera (in chambers) and are not available for public review.
 - HB 4314 must address how and when redacted and omitted records are and can be reviewed by the Commission – even for records that might be submitted for “in camera” review. Judges and their staff are full time and have not only a duty but also practices to protect information a judge might get for in camera review. Although the draft provides that exempted records or information would not be available for public review unless and until the Commission overrules the exemption, having Commission members for whom serving on the Commission is a very part-time duty, who may be tempted to disclose certain exempt information reviewed – particularly Commission members who represent the media – is of concern, even with the provision that says the exemption continues unless the Commission rules otherwise.
 - Exemption from disclosure also needs to continue for any period during which the public body has the right to decide whether it will appeal the decision.

- Records prohibited from disclosure by statute – e.g., social security numbers, closed session minutes, drawings or maps of water systems – may provide for disclosure in the course of judicial review, but generally do not cover review by a body such as the proposed Commission. How does a public body respond when caught between the “rock” of compliance with statutory prohibitions against disclosure and the “hard place” of trying to cooperate with the Commission’s investigation?
- The cost of an appeal to the Commission will be a burden not only to the public body but also for the individual who brings the appeal. Instead of a local court, both the public body and the requester will need to travel to Lansing.

